

## LI-FOONG ENTERPRISE SDN BHD

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v.

## MOK YUEN LOK &amp; ANOR

HIGH COURT MALAYA, KUALA LUMPUR  
RAMLY ALI J

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[ORIGINATING SUMMONS NO: D5-24-271-2005]  
3 APRIL 2006

**COMPANY LAW:** *Winding up - Provisional liquidator - Application to appoint by members - Whether plaintiff has locus standi - Companies Act 1965, s. 261(2) - Whether s. 223 Companies Act 1965 contravened - Whether appointment invalid - Whether premature - Companies Act 1965, s. 255(1) - Whether independence of provisional liquidator questionable - Whether appointment of defendants by creditors as joint liquidators maintained*

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The plaintiff in this originating summons sought a declaration that Dr Ler Cheng Chye of Messrs. Ler Lum & Co, having been validly nominated by the members of Empire Legacy Sdn Bhd at a members' meeting held on 19 July 2005 shall be the liquidator of the said Empire Legacy Sdn Bhd particularly in the absence of a valid nomination on the part of the creditors; or alternatively that Dr Ler Cheng Chye of Messrs. Ler Lum & Co shall be a liquidator of Empire Legacy Sdn Bhd instead of the persons purportedly nominated by the creditors namely Mok Yuen Lok and Onn Kien Hoe ('the defendants') of Messrs. Horwarth. The plaintiff argued that if the company's creditors did not validly nominate a liquidator at the creditors' meeting, then the company's nomination (by the shareholders) would be unequivocally deemed by law to be the liquidator of the company. The defendants, on the other hand, contended that the plaintiff, who was not a director, member nor creditor of Empire Legacy, had no *locus standi* to challenge the appointment of the defendants as liquidators. Further, the defendants contended that the appointment of Dr Ler as provisional liquidator was premature and improper, on the ground that it was made before a statutory declaration of insolvency had been lodged with the Registrar of Companies and the Official Receiver as required under s. 255(1) of the Companies Act 1965.

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**A    Held (dismissing plaintiff’s application with costs):**

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- (1)** The plaintiff was not a shareholder, director nor creditor of Empire Legacy at the material time. The plaintiff had wrongfully held itself out as shareholder of Empire Legacy in an attempt to clothe itself with *locus standi* to present this application. Empire Legacy was wholly owned by Li Foong Industrial Development Sdn Bhd (in Liquidation) (Li Foong Industrial) not Li Foong Enterprise (the plaintiff). An application under s. 261(2) of the Companies Act 1965 could only be brought either by a director, member or creditor of the company.
  - (2)** In contravention of s. 223 of the Companies Act 1965, the form 32A produced by the plaintiff to assert Li Foong Enterprise as shareholder of Empire Legacy on 7 October 2003 was signed by two unidentified persons, without leave of court before whom the liquidation of Li Foong Industrial was then pending. The ‘disposition’ of 7 October 2003 was not effected with the sanction of the Official Receiver although Li Foong Industrial had been in liquidation as of 15 April 2002. The Form 32A appeared to have been suppressed and concealed from the liquidator of Li Foong Industrial by the principals of Li Foong Industrial (and Li Foong Enterprise). There was no valuable consideration from Li Foong Enterprise for the alleged transfer of RM36 million shares.
  - (3)** The said nomination of Dr Ler as liquidator of Empire Legacy would only be valid if the EGM was attended by Empire Legacy’s *bona fide* members or shareholders – ie, Li Foong Industrial. There was no record to show that Li Foong Industrial was represented at the said EGM. It was the plaintiff, Li Foong Enterprise, holding itself out as a member or shareholder of Empire Legacy that attended the EGM and nominated Dr Ler as liquidator. Such an appointment was invalid.
  - (4)** The statutory declaration was lodged with the Registrar of Companies on 1 July 2005. Although the appointment of a provisional liquidator ought to have followed the lodgement of the statutory declaration, the appointment of Dr Ler as provisional liquidator was affected on 28 June 2005 (before the lodgement) and was therefore premature. Prematured appointment may adversely affect its validity in the light of s. 255(1) of the Companies Act 1965.

- (5) On a balance of probabilities, Dr Ler was appointed as provisional liquidator as he was perceived as someone through whom the principals could continue to wield control over the affairs of the Empire Legacy and the manner in which the assets were dealt with during the liquidation process. The independence of Dr Ler was questionable. This was compounded by the irregularities noted in the commencement and conduct of the creditor's voluntary winding up of Empire Legacy. A liquidator must be one who will act independently and impartially. Dr Ler appeared an unsuitable candidate. A B
- (6) At the creditors' meeting, the chairman had requested nominations from the creditors present. Only the defendants were nominated. Not one of the creditors present at the creditors' meeting, including the plaintiff, objected to the nomination and appointment of the defendants' as joint liquidators and none of them supported the members' nomination for the appointment of Dr Ler as the liquidator. The company secretary confirmed that there were no other nominations and in accordance with s. 261(1) of the Companies Act 1965, the nomination of the defendants at the creditors' meeting prevailed over that of Dr Ler at the EGM. Accordingly the chairman confirmed the defendants as joint liquidator of Empire Legacy. C D E
- (7) This court was satisfied that the appointment of the defendants by the creditors as joint liquidators of Empire Legacy ought to be maintained. There was no merit in the plaintiff's application. F

**Case(s) referred to:**

- George A Bond & Company Ltd* [1932] SR (New South Wales) Vol 32 301 (refd) G
- Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (refd)
- Re Chartered Goldfields (Limited)* [1909-1910] *The Times* LR Vol XXVI 132 (refd)
- Re Karamelli & Barnett Ltd* [1916] 1 Ch 203 (refd) H

**Legislation referred to:**

Companies Act 1965, ss. 16(6), 223, 255(1)(b), 260(1), 261(1), (2)

**A**    *For the plaintiff - HM Ooi; M/s Logan Sabapathy & Co*  
*For the defendants - Mohan Krishnan; M/s Sri Ram & Co*  
  
*Reported by Suhainah Wahiduddin*

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## **JUDGMENT**

**Ramly Ali J:**

**C**    **[1]**    In the present originating summons, the plaintiff seeks a declaration that Dr. Ler Cheng Chye of Messr. Ler Lum & Co., having been validly nominated by the Members of Empire Legacy Sdn. Bhd. at a Members' meeting held on 19 July 2005 shall be the liquidator of the said Empire Legacy Sdn. Bhd., particularly in the absence of a valid nomination on the part of the creditors; or  
**D**    alternatively, that Dr. Ler Cheng Chye of Messrs. Ler Lum & Co. shall be a liquidator of Empire Legacy Sdn. Bhd. instead of the persons purportedly nominated by the creditors namely Mok Yuen Lok and Onn Kien Hoe of Messrs. Horwarth.

**E**    **Relevant Background**

**F**    **[2]**    There is a company called Empire Legacy Sdn. Bhd. It is insolvent. On 19 July 2005 the plaintiff (claimed to be the shareholder of Empire Legacy) passed resolutions for the company to be voluntarily wound-up; and for the nomination of one Dr. Ler Cheng Chye as liquidator of the company.

**G**    **[3]**    On the same day (19 July 2005) the defendants (Mok Yuen Lok and Onn Kien Hoe) were also appointed by the creditors as liquidators of Empire Legacy pursuant to a resolution of the creditors.

By the amended originating summons herein, the plaintiff seeks declaratory relief that Dr. Ler and not Mok & Onn, as the true and proper liquidator of Empire Legacy.

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**Plaintiff's Arguments**

**[4]**    The plaintiff's originating summons was filed pursuant to s. 261(2) of the Companies Act 1965 which *inter alia*, provides:

**I**    ... where different persons are nominated any director member or creditor may, within seven days after the date on which the nomination was made by the creditors, apply to Court for an

order directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors.

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[5] The plaintiff therefore argues that if the company's creditors did not validly nominate a liquidator at the creditors' meeting, then the company's nomination (by the shareholders) would be unequivocally deemed by law to be the liquidator of the company. The plaintiff further argues that in law there can be no nomination (of liquidator) by the creditors unless a vote was taken and a resolution passed at the creditors meeting that such nomination be made; in fact, no such voting took place and no such resolution was passed at the creditors meeting; therefore, since no person was appointed as liquidator by the company's creditors, s. 261(1) of the Companies Act 1965 dictates that, Dr. Ler who was nominated or appointed by the shareholder (and hence by the company) should be the liquidator of the company.

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### Defendant's Arguments

[6] The defendants, on the other hand argue that the plaintiff, who is not a director, member nor creditor of Empire Legacy, has no *locus standi* to challenge the appointment of the defendants as liquidators. The defendants further contend that the shareholders' nomination or appointment of Dr. Ler as liquidator at the EGM on 19 July 2005 is invalid on the ground that the said EGM was not attended by Empire Legacy's *bona fide* shareholder, Li-Foong Industrial. The defendants further argue that the appointment of Dr. Ler as provisional liquidator is premature and improper, on the ground that it was made before a statutory declaration of insolvency being lodged with the Registrar of Companies and the official receiver as required under s. 255(1) of the Companies Act 1965. The defendants also contended that the appointment of Dr. Ler as liquidator was for collateral purpose to control the affairs and liquidation process of Empire Legacy.

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### Findings Of The Court

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[7] The said company Empire Legacy was insolvent and voluntarily wound-up. As to the necessity for meetings in the voluntary liquidation of an insolvent company, s. 260(1) of the Companies Act 1965 is relevant and reads:

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- A** The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding-up is to be proposed ...
- B** As to the appointment of a liquidator of such a company, s. 261(1) of the Companies Act 1965 provides that:
- The company shall and the creditors may at their respective meetings nominate a person to be liquidator ... and if the creditors and the company nominate different persons the person nominated by the creditors shall be liquidator ...
- C** with the caveat that:
- ... if no person is nominated by the creditors the person nominated by the company shall be liquidator.
- D** Whilst it is mandatory for a company to nominate a liquidator, it is optional to its creditors to nominate a liquidator at a creditors' meeting.
- E** A validly nominated liquidator at a creditors' meeting would prevail over one nominated by the company in question, subject to s. 261(2) of the Companies Act 1965, which provides:
- ... where different persons are nominated any director member or creditor may within seven days after the date on which the nomination was made by the creditors, apply to Court for an order directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors.
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- [8]** Section 261(2) of the Companies Act 1965 clearly stipulates
- G** that an application to the court for an order directing that the person nominated as liquidator by the company shall be the liquidator instead of or jointly with the person nominated by the creditors, can only be made either by a director, a member (shareholder) or creditor of the company. No other person can
- H** initiate any such application.
- [9]** In the present case, the plaintiff is neither a director nor a creditor of the company. The plaintiff claims to be a member or shareholder of the company at the material time and thus has the necessary *locus standi* to make an application under s. 261(2) of the Companies Act 1965.
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[10] The issue to be determined here is whether the plaintiff is a shareholder or member of Empire Legacy at the material time.

[11] On the evidence available, the court cannot find support to the plaintiff's contention that it is a shareholder or member of Empire Legacy at the material time. The plaintiff wrongfully holds itself out as shareholder of Empire Legacy in an attempt to clothe itself with *locus standi* to present this application. The court is satisfied that the plaintiff is not the shareholder or member of Empire Legacy at the material times on the following grounds:

(a) in actual fact, Empire Legacy is wholly owned by Li-Foong Industrial Development Sdn. Bhd. (in Liquidation) Li-Foong Industrial), not Li-Foong Enterprise (the plaintiff). There are totally distinct and separate entities under the law. Two (2) current ROC searches show Empire Legacy to be owned by Li-Foong Industrial (in Liquidation) and not by the plaintiff;

(b) Empire Legacy itself confirmed in its financial statements as at 31 December 2002 that Empire Legacy is wholly owned by Li-Foong industrial;

(c) Li-Foong Industrial is under liquidation. Its court appointed liquidator, Dr. V. Shanmughanathan has by letter dated 17 December 2006 confirmed the following:

there are no documentation to show that Li-Foong Industrial's) 36 million shares in Empire Legacy have been transferred to Li-Foong Enterprise ... Kindly request them to whom the 36 million has been paid. As per our records, Li-Foong Industrial has not received any payments by the said company for the transfer of the shares.

(d) Li-Foong Industrial was wound-up by order of court dated 12 March 2004. The winding-up of Li-Foong Industrial (the true owner of Empire Legacy) commenced upon the presentation of the winding-up petition on 15 April 2002. From Empire Legacy's financial statement it is clear that Li-Foong Industrial remained 100% owner of Empire Legacy until 31 December 2002. The liquidator of Li-Foong Industrial has no record of any transfer or consideration. Even if, as the plaintiff alleges, Li-Foong Industrial had transferred its 100% Empire Legacy's shares to the plaintiff after 31 December 2002 (ie, after commencement of winding-up against Li-Foong Industrial) such a transfer is in contravention of s. 223 of the Companies Act 1965 and is void. Section 223 provides:

- A** Any deposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.
- B** (see *Lian Keow Sdn. Bhd. (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn. Bhd. & Ors* [1988] 2 MLJ 449).
- [12]** By its last affidavit, the plaintiff produced Empire Legacy's Register of Members and a Form of Transfer of Securities (Form 32A) to assert Li-Foong Enterprise (the plaintiff) as shareholder of Empire Legacy as of 7 October 2003. Curiously, these were not produced when the plaintiff's ownership was first challenged and have just surfaced. In any event, the Form 32 fortifies the court's finding that the transfer is void in that:
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- D** (i) in contravention of s. 223 of the Companies Act 1965, the Form 32A dated 7 October 2003 (18 months after Li-Foong Industrial's compulsory liquidation started) was signed by 2 unidentified persons, without leave of the court before whom the liquidation of Li-Foong Industrial was then pending;
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- F** (ii) the 'disposition' on 7 October 2003 was not effected with the sanction of the official receiver although Li-Foong Industrial had been in liquidation as of 15 April 2002. The Form 32A appears also to have been suppressed and concealed from the liquidator of Li-Foong Industrial by the principals of Li-Foong Industrial (and Li-Foong Enterprise) ie, Yong and her spouse, Woo who jointly own 44% of Li-Foong Industrial and 100% of Li-Foong Enterprise; and
- G** (iii) there was no valuable consideration from Li-Foong Enterprise for the alleged transfer of RM36 million shares. Consideration was a token sum of RM1 whereas even a par value of the shares would be RM36 million.
- H** **[13]** It is therefore clear that the plaintiff is not a shareholder, director nor creditor of Empire Legacy at the material times and was not entitled to present his application and on that basis alone, this application should be dismissed *in limine*. As stated earlier, an application under s. 261(2) of the Companies Act 1965 can only
- I** be brought either by a director, member or creditor of the company.

**Validity Of Dr. Ler's Appointment As Liquidator**

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**[14]** Dr. Ler was appointed as liquidator of Empire legacy on 19 July 2005 allegedly by the “shareholders” of the company in an EGM held for that purpose. The plaintiff contends that the appointment is valid.

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Under s. 261(1) of the Companies Act 1965, “the company shall and the creditors may at their respective meetings nominate a person to be liquidator for the purpose of winding-up the affairs and distributing the assets of the company ...”

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The word “company” refers to the shareholder or members of the company in the context of s. 261(1) above. In other words, nomination or appointment of a liquidator can only be made by the company through its true shareholder or member, but not any body else. Under s. 16(6) of the Companies Act 1965, member of a company refers to “every other person who agrees to become a member of a company and whose name is entered in its register of members”.

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**[15]** In the present case the said nomination of Dr. Ler as liquidator of Empire Legacy would only be valid if the EGM was attended by Empire Legacy’s *bona fide* members or shareholders – ie, Li-Foong Industrial. There is no record to show that Li-Foong Industrial was represented at the said EGM. It was the plaintiff, Li-Foong Enterprise, holding itself out as a member or shareholder of Empire Legacy that attended the EGM and nominated Dr. Ler as liquidator.

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The nomination of Dr. Ler was in fact by none other than Yong (evident from the minutes produced) who together with her spouse owns Li-Foong Enterprise (the plaintiff) and is the principals of Empire Legacy. The court is of the view that such an appointment is invalid.

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**Appointment By Dr Ler Is Premature And Improper**

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**[16]** Section 255(1) of the Companies Act 1965 provides that:

where the directors of a company have made a statutory declaration in the prescribed form which has been lodged with the Registrar and with the Official Receiver:

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- (a) that the company cannot by reason of its liabilities continue its business; and

- A** (b) that meetings of the company and of its creditors have been summoned for a date within one month of the date of the declaration,

the director shall forthwith appoint an approved liquidator to be the provisional liquidator.

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**[17]** An appointment of a provisional liquidator in a voluntary winding-up can only be made after a statutory declaration in the prescribed form has been lodged with the Registrar of Companies and the official receiver. The appointment must be made forthwith after such lodgment had been made. Section 255(1)(b) of the Companies Act 1965 also requires that meetings of the company and of its creditors should have been summoned for a date within one (1) month from the date of the declaration.

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**[18]** In the present case, it is not disputed that the statutory declaration was lodged with the Registrar of Companies on 1 July 2005. Although the appointment of a provisional liquidator ought to have followed the lodgement of the statutory declaration, in the present case, the appointment of Dr. Ler as provisional liquidator preceded the lodgement of the statutory declaration. The appointment of Dr. Ler as provisional liquidator was affected on 28 June 2005 (before the lodgement) and is therefore premature. Prematured appointment may adversely affect its validity in the light of s. 255(1) of the Companies Act 1965.

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**Collateral Purpose – To Control The Affairs And Liquidation Process Of Empire Legacy**

**[19]** The principal directors of Empire Legacy are Yong Chow Mooi (“Yong”) and her spouse, Woo Mean Cheong (“Woo”).

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Yong was also its principal officer and manager. In fact, Yong and Woo were the only directors of Empire Legacy, a property development company, until 17 June 2005, when 2 individuals namely Mohd Aslan bin Abd Ghaffor and Abdul Wahid bin Jaafar were (curiously) appointed directors (a mere 10 days before the

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directors’ resolution for voluntary liquidation).

**[20]** Yong and Woo also jointly own the plaintiff, Li-Foong Enterprise. Yong is a director of Li-Foong Enterprise, which has made this application to appoint Dr. Ler as liquidator of Empire

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[21] On the balance of probabilities, the court believes that Yong and Woo caused the directors of Empire Legacy to appoint Dr. Ler as provisional liquidator and subsequently caused the plaintiff to nominate Dr. Ler as liquidator as he was perceived as someone through whom the principals could continue to wield control over the affairs of Empire Legacy and the manner in which the assets are dealt with during the liquidation process.

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[22] In this regard it is noteworthy that a few days before the 1st creditors meeting, Dr. Ler called the largest creditor of Empire Legacy, RHB Bank, representing that he had a 'White Knight' interested in reviving Empire Legacy's development project. Dr. Ler did not disclose that he was representing the plaintiff, Li-Foong Enterprise (jointly owned by Yong and Woo) a fact which subsequently became known.

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[23] Dr. Ler did so at the behest of Yong and Woo, who intended to wrest control of the (creditor's voluntary) liquidation from the creditors so as to secure through the instrumentality of Dr. Ler, the benefit of the assets of Empire Legacy at below its true value to recommence substantially the same business free of the liabilities of a failed company.

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[24] Under such circumstances the independence of Dr. Ler is questionable. This is compounded by the irregularities noted in the commencement and conduct of the creditor's voluntary winding-up of Empire Legacy.

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[25] Having regard to the authority with which a liquidator is invested, he must be one who will act independently and impartially. Given the above, Dr. Ler appears an unsuitable candidate. In *Re Charterland Goldfields (Limited)* (1909-1910) The Times LR Vol. XXVI 132, it was held:

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Where it appeared that the liquidator in the voluntary winding-up of a company had an intimate business connection with several of the directors of the company who were also directors of other companies between which and the company in question here had been dealings requiring investigation, the Court, being of the opinion that he was not in a position to take an independent course in making the necessary investigations, made an order removing him from the office of liquidator and appointed another liquidator in his place.

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- A [26] In the case of an insolvent company or in the case of a winding-up the wishes of the creditors should have special considerations and weight in the appointment of liquidator.  
(see: In *Re Karamelli & Barnett, Limited* [1916] 1 Ch. 203).
- B If there is reasonable belief that the interest of creditors would be imperiled if the liquidator were to remain in office, or if the liquidator is not sufficiently independent to promote the interest of the creditors and to examine the impropriety of the company's pre-liquidation dealings as the substantial and real interest of the
- C liquidation requires, then he should be removed.  
(see: *George A Bond & Company Limited* [1932] SR (New South Wales) Vol. 32 301).
- D This principle finds support under s. 261(1) of the Companies Act 1965 where it is provided, *inter alia* that "if the creditors and the company nominate different persons, the person nominated by the creditors shall be the liquidator."
- E [27] In the present case, at the creditors meeting, the Chairman requested nominations from the creditors present. Only the defendants were nominated. No other nomination was made. It is note worthy that not one of the creditors present at the creditors meeting, including the plaintiff, objected to the nomination and
- F appointment of the defendants as joint liquidators and none of them supported the members' nomination for the appointment of Dr. Ler as the liquidator. The Company Secretary confirmed that there were no other nominations and in accordance with s. 261(1) of the Companies Act 1965, the nomination of the defendants at
- G the creditors meeting prevailed over that of Dr. Ler at the EGM. Accordingly, the Chairman confirmed the defendants as joint liquidator of Empire Legacy. Thereafter, by letter dated 25 July 2005 their appointment as joint liquidators was confirmed by Empire Legacy.
- H [28] By reason of the matters set out above, the court is satisfied that the appointment of the defendants by the creditors as joint liquidators of Empire Legacy ought to be maintained in the circumstances of this case.

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**Conclusion**

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**[29]** After having given due consideration to all the evidence and submissions made by both sides, the court comes to a conclusion that there is no merit in the plaintiff's application. Therefore, the plaintiff's application is dismissed with costs.

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